STATE OF CALIFORNIA
FAIR POLITICAL PRACTICES COMMISSION
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Re: Your Request for Advice
Our File No. A-21-112/113

Dear Mr. Ennis and Mr. McEntee:

This letter responds to your requests for advice regarding the Political Reform Act ("Act") [1] and Government Code Section 1090, et seq. Please note that we are only providing advice under the Act and Section 1090, not under other general conflict of interest prohibitions such as common law conflict of interest, including Public Contract Code.

Also, note that we are not a finder of fact when rendering advice (*In re Oglesby* (1975) 1 FPPC Ops. 71), and any advice we provide assumes your facts are complete and accurate. If this is not the case or if the facts underlying these decisions should change, you should contact us for additional advice.

We are required to forward your request regarding Section 1090 and all pertinent facts relating to the request to the Attorney General's Office and the Los Angeles County District Attorney's Office, which we have done. (Section 1097.1(c)(3).) We did not receive a written response from either entity. (Section 1097.1(c)(4).) We are also required to advise you that, for purposes of Section 1090, the following advice "is not admissible in a criminal proceeding against any individual other than the requestor." (See Section 1097.1(c)(5).)

[1] The Political Reform Act is contained in Government Code Sections 81000 through 91014. All statutory references are to the Government Code, unless otherwise indicated. The regulations of the Fair Political Practices Commission are contained in Sections 18109 through 18998 of Title 2 of the California Code of Regulations. All regulatory references are to Title 2, Division 6 of the California Code of Regulations, unless otherwise indicated.

QUESTION

Under the Act and Section 1090, may the City of Santa Clarita contract for the acquisition of land and/or land rights for real property necessary for a long-planned roadway extension project, given that the real property is owned by Santa Clarita Mayor Pro Tem Laurene Weste?

CONCLUSION

Under the Act, decisions pertaining to the acquisition of land and/or land rights owned by Mayor Pro Tem Weste would have a reasonably foreseeable, material financial effect on her real property interest and she is therefore prohibited from taking part in such decisions. Section 1090 also prohibits Mayor Pro Tem Weste from taking part in any contracting process in her official capacity, but the "rule of necessity" would permit the City to contract with Mayor Pro Tem Weste in her capacity as the landowner.

FACTS AS PRESENTED BY REQUESTER

The City of Santa Clarita ("City") has long planned for the construction of an extension of Dockweiler Drive from its current terminus. The proposed extension of Dockweiler Drive involves the acquisition of required right of way, slope easements and temporary construction easements across several properties and then the construction of an approximately one mile long, 92-foot wide four-lane secondary highway from Leonard Tree Lane to Placerita Canyon Road. A bicycle path along and across a portion of Dockweiler Drive is also part of the project.

The Dockweiler Drive Extension Project ("Project") is a major component of the Circulation Element of the General Plan and would provide long-planned and needed connectivity between two areas of the City and is anticipated to be used by between 3,000 and 7,000 vehicles per day, depending on the particular segment of the roadway extension. For these reasons, it is not feasible for the City to simply not construct the Project. In addition, the area of the City through which the Project would traverse has several topographical challenges. There is a significant elevation change from one end of the Project to the other. The area also has hills, slopes, and ravines throughout it. These challenges require careful design of the roadway's curvature, gradient and alignment to fit this area and provide a safe and functional roadway. Relocation of the roadway to other portions of the area or shifts in alignment have been carefully studied and are not feasible to achieve the physical, engineering, functional and safety requirements of the Project.

As part of the land acquisition for the extension of Dockweiler Drive, the City will seek to acquire or confirm City's ownership of two existing unimproved street easements that run through the proposed right of way to Dockweiler Drive. These two street easements were obtained by the County of Los Angeles prior to the City's incorporation and are known as Lyons Avenue and Emberbrook Drive. It is likely that the City may need to enter into an agreement with the County of Los Angeles to confirm the City's acquisition or ownership of those street segments.

Laurene Weste is the Mayor Pro Tem of the City. She currently owns six parcels of land located on the south side of Placerita Canyon Road, totaling approximately 7.08 acres of land. These parcels are generally located west of Aden Avenue and east of 12th Street. Two of the parcels are used as Mayor Pro Tem Weste's residence and accessory structures and uses. Two other parcels are currently vacant and the remaining two parcels are currently leased to a plant nursery.

The unimproved but existing right of way for the extension of Lyons Avenue runs somewhat diagonally through the grouping of Mayor Pro Tem Weste's six parcels. Slope easements also exist adjacent to the Lyons Avenue right of way along the edges of some of Mayor Pro Tem Weste's parcels. It is anticipated that in connection with the street acquisition process for Dockweiler Driver, the existing right of way for Lyons Avenue adjacent to Mayor Pro Tem Weste's parcels would either be confirmed as being already held by the City by operation of law or would be the subject of an acquisition agreement entered into between the City and the County of Los Angeles. Once acquired, that Lyons Avenue street easement would be vacated and then the portions of that right of way not needed for the Project would be conveyed to Mayor Pro Tem Weste to offset all or part of the value of the portions of Mayor Pro Tem Weste's six parcels acquired by the City.

With all required roadway dedications (including slope easements and temporary construction easements), the City would need to acquire approximately 69,332 square feet for these uses from Mayor Pro Tem Weste. In conjunction with these acquisitions, the City would be able to vacate the Lyons Avenue rights of way and slope easements that total approximately 72,554 square feet. Thus, with the current design, it is estimated that Mayor Pro Tem Weste's usable area of her land could increase by approximately 3,222 square feet as a result of the dedications and easements needed for the Project and the vacation of the Lyons Avenue right of way. However, at the conclusion of the right of way acquisition process (for the Dockweiler Drive Extension Project) and the street vacation process (involving Lyons Avenue), some of the existing and remaining parcels or fragments of parcels may not be of sufficient size or configuration for future development. A voluntary merger of some of her current parcels, lot line adjustments of some of the parcel fragments, or one or two parcel maps is likely to be requested or needed by Mayor Pro Tem Weste to better configure the parcel lines so as to permit development consistent with current zoning development standards.

ANALYSIS

The Act

Under Section 87100 of the Act, "[n]o public official at any level of state or local government shall make, participate in making or in any way attempt to use his official position to influence a governmental decision in which he knows or has reason to know he has a financial interest." "A public official has a financial interest in a decision within the meaning of Section 87100 if it is reasonably foreseeable that the decision will have a material financial effect, distinguishable from its effect on the public generally, on the official, a member of his or her immediate family," or on certain specified economic interests. (Section 87103.) Among those specified economic interests is "[a]ny real property in which the public official has a direct or indirect interest worth two thousand dollars ($2,000) or more." (Section 87103(b).)

Regulation 18701(a) provides the applicable standard for determining the foreseeability of a financial effect on an economic interest explicitly involved in the governmental decision. It states, "[a] financial effect on a financial interest is presumed to be reasonably foreseeable if the financial interest is a named party in, or the subject of, a governmental decision before the official or the official's agency. A financial interest is the subject of a proceeding if the decision involves the

issuance, renewal, approval, denial or revocation of any license, permit, or other entitlement to, or contract with, the financial interest, and includes any governmental decision affecting a real property financial interest as described in Regulation 18702.2(a)(1)-(6)."

The reasonably foreseeable financial effect of a governmental decision on a parcel of real property in which an official has a financial interest, other than a leasehold interest, is material whenever the governmental decision "[a]uthorizes the sale, purchase, or lease of the parcel." (Regulation 18702.2(a)(4).) A governmental decision's reasonably foreseeable financial effect on a parcel is also material whenever the decision "[i]nvolves the issuance, denial or revocation of a license, permit or other land use entitlement authorizing a specific use of or improvement to the parcel or any variance that changes the permitted use of, or restrictions placed on, the property." (Regulation 18702.2(a)(5).)

Because the governmental decision at issue concerns the potential sale or lease of Mayor Weste's land, or some related land use entitlement authorizing a specific use or improvement to the property, the decision would have a reasonably foreseeable, material financial effect on her real property interest. Accordingly, the Act prohibits Mayor Pro Tem Weste from taking part in any such decision in her capacity as Mayor and she must recuse herself from those governmental decisions.

In regard to taking part in negotiating and exercising an agreement outside of her official capacity, we note that Section 87100 generally prohibits an interested official from attempting to influence a decision. For a decision before the official's own agency, an attempt to influence a decision includes any attempt to contact or appear before an agency official for the purpose of affecting the decision. (Regulation 18704(c)(1).) However, an interested official is not prohibited from appearing before the official's own agency in the course of its prescribed governmental function in the limited circumstances of an appearance related solely to the official's personal interest in real property owned entirely by the official, the official's immediate family, or the official and the official's immediate family. (Regulation 18704(d)(2)(A).) Accordingly, so long as the property is solely owned by Mayor Pro Tem Weste and her immediate family members, Mayor Pro Tem Weste is not prohibited from negotiating and exercising an agreement with the City in her individual capacity.[2]

Section 1090

Under Section 1090, public officials "shall not be financially interested in any contract made by them in their official capacity, or by any body or board of which they are a member." Section 1090 is concerned with financial interests, other than remote or minimal interests, that prevent public officials from exercising absolute loyalty and undivided allegiance in furthering the best

[2] Note, however, that Mayor Weste must appear before the City in the course of its prescribed governmental function. For any decision that will go before the City Council at a public meeting, Mayor Weste may not contact or appear before another member of the City Council outside of the public meeting. Regulation 18707(a) contains the relevant requirements a disqualified city council member must follow, including instructions for recusal, at a public meeting. While disqualified officials are generally required to leave the room during discussion of the item, Regulation 18707(3)(B) permits an official with a personal interest in an agenda item, as defined in Regulation 18704(d)(2), after identifying their interest, recusing themselves from the item, and leaving the dais, to remain in the room in order to speak or observe from the area reserved for members of the public.

interests of their agencies. (*Stigall v. City of Taft* (1962) 58 Cal.2d 565, 569.) Under Section 1090, "the prohibited act is the making of a contract in which the official has a financial interest." (*People v. Honig* (1996) 48 Cal.App.4th 289, 333.) A contract that violates Section 1090 is void, regardless of whether the terms of the contract are fair and equitable to all parties. (*Thomson v. Call* (1985) 38 Cal.3d 633, 646-649.) When Section 1090 is applicable to one member of a governing body of a public entity, the prohibition cannot be avoided by having the interested board member abstain; the entire governing body is precluded from entering into the contract. (*Id.* at pp. 647-649.)

A property acquisition agreement between the City and Mayor Pro Tem Weste, whether it involves the sale, lease, or some other conveyance of the property, would constitute a clear example of a contract in which Mayor Pro Tem Weste has a disqualifying financial interest under Section 1090. Accordingly, such a contract would be prohibited even with Mayor Pro Tem Weste's recusal unless an exception applies.

The Legislature has created various statutory exceptions to Section 1090's prohibition where the financial interest involved is deemed to be a "remote interest," as defined in Section 1091, or a "noninterest," as defined in Section 1091.5. However, based upon the facts provided, it does not appear that any of these exceptions are currently applicable. Accordingly, we analyze the potential application of the rule of necessity.

In limited circumstances, the "rule of necessity" has been applied to allow the making of a contract that Section 1090 would otherwise prohibit. (*Dietrick* Advice Letter, No. A-15-174; 88 Ops.Cal.Atty.Gen. 106, 110 (2005).) The California Supreme Court has stated, "[t]he rule of necessity permits a government body to act to carry out its essential functions if no other entity is competent to do so (*Eldridge v. Sierra View Local Hospital Dist.*, *supra*, 224 Cal.App.3d at pp. 321-322; see *Olson v. Cory* (1980) 27 Cal.3d 532, 537 . . .), but it requires all conflicted members to refrain from any participation. If a quorum is no longer available, the minimum necessary number of conflicted members may participate, with drawing lots or some other impartial method employed to select them. (*Eldridge*, at pp. 322-323.)" (*Lexin v. Superior Court* (2010) 47 Cal.4th 1050, 1097.)

The rule of necessity has been applied in at least two specific types of situations: 1) in procurement situations for essential supplies or services when no source other than the one that triggers the conflict is available; and 2) in non-procurement situations to carry out essential duties of the office when the official or board is the only one authorized to act.

The facts present here are similar to those considered in *Schons* Advice Letter, No. A-16-180. There, a water district sought advice as to whether it could permissibly negotiate a resolution of various easement and related property access claims with the landowner, a member of the water district's board of directors. The district sought to negotiate an agreement and avoid a potentially time-consuming and costly lawsuit. With respect to the rule of necessity, we advised:

> In the present matter, in order to properly access its property containing the tank site and the waste water treatment plant, which unquestionably provide essential services to the community, the District must resolve ongoing easement and related property access claims with Director Kuehn. As the owner of the real property on which all of these access issues are occurring, Director Kuehn is the source triggering

> the conflict and the only person able to negotiate a potential agreement with the District to resolve the dispute over access to important District property.
>
> Accordingly, based on these facts and consistent with the law, we find that the rule of necessity applies to allow the District to enter into an agreement with Director Kuehn to resolve all property-related issues concerning access to its land. Of course, Director Kuehn must abstain from any participation in the making of the agreement *in his official capacity* as a member of the District board.

(*Schons* Advice Letter, No. A-16-180.)

You have indicated that due to the long-planned nature of the Project and the need for connectivity between two areas of the City, "it is not feasible for the City to simply not construct the Project." Additionally, you have noted the City's belief that both the acquisition of the right of way and easements in connection with the construction of the Project, as well as the vacation of the Lyons Avenue right of way, are in furtherance of an essential City function—i.e., building out the City's planned roadway system. The City also believes that a pre-litigation settlement agreement with Mayor Weste that provides for the acquisition and disposal of land regarding the needed right of way is necessary to provide for the accomplishment of that Project in a manner that avoids unnecessary litigation and expenses. Given these circumstances and consistent with the *Schons* Advice Letter, *supra*, we find that the rule of necessity applies here as well.

If you have other questions on this matter, please contact me at (916) 322-5660.

Sincerely,

Dave Bainbridge
General Counsel

By: Kevin Cornwall
Counsel, Legal Division

KMC:dkv